IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-147

BOB BULLOCK, ET AL.,
Appellants,

v.

DIANA REGESTER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

This appeal is from the decision of the United States District Court for the Western District of Texas holding that the legislative redistricting of the State of Texas is constitutionally defective because (1) the State of Texas failed to justify each and every population variance between districts, and (2) the use of multi-member districts in Dallas and Bexar Counties tends to dilute the votes of Negro citizens (Dallas County) and Mexican-American citizens (Bexar County).

OPINIONS BELOW

The opinions and orders of the trial court below are reported at 343 F.Supp. 704. They are reproduced in the separately bound Appendix to the Jurisdictional Statement (A.Jur.S.). They consist of: a per curiam opinion (A. Jur.S. 1A-62A); the order of the court (A.Jur.S. 63A-82A); a separate opinion of District Judge Justice, concurring in part and dissenting in part (A.Jur.S. 83A-96A); a separate opinion of District Judge Wood, concurring in part and dissenting in part (A.Jur.S. 97A-108A); a notation by Circuit Judge Goldberg, concurring specially in the result of Section IV of the per curiam opinion (having to do with multi-member districts in Bexar County) (A. Jur.S. 109A); and an amendatory order (A.Jur.S. 110A-113A).

Application for stay of that portion of the lower court judgment immediately implementing single-member districts in Dallas and Bexar Counties was presented to Mr. Justice Powell and by him denied, with opinion. 405 U.S. 1201 (A.Jur.S. 197H).

JURISDICTION

The actions below were brought to enjoin enforcement of a statute of the State of Texas enacted by the Legislative Redistricting Board of Texas pursuant to Article III, Section 28 of the Texas Constitution. Jurisdiction of the three-judge district court was invoked under 28 U.S.C. §§ 1343 and 2281. The date of the judgment sought to be reviewed was January 28, 1972. Notice of Appeal was filed March 27, 1972 (114B) in the United States District Court for the Western District of Texas, Austin Division. On May 19, 1972, by order in No. A-1207, Mr. Justice Powell extended time for docketing this appeal to and

including July 25, 1972. This appeal was filed on that date. Probable jurisdiction was noted on October 10, 1972. One week additional time for filing this brief to and including December 1, 1972, was granted. The jurisdiction of this Court to review the judgment of the district court is founded on 28 U.S.C. §§ 1253 and 2101(b). Jurisdiction is supported by *Swann* v. *Adams*, 385 U.S. 440 (1967), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There is one Texas statute and one provision of the Texas Constitution involved. The statute is the Apportionment of the State of Texas Into Representative Districts. (A.Jur.S. 118C-132C). The constitutional provision is Article III, Section 26, of the Texas Constitution. (A.Jur.S. 174E)

QUESTIONS PRESENTED

I. Whether Texas' legislative districting plan was a permissible one within the standards hitherto set by this Court, and hence whether the action of the court below, in overturning the State's plan, was improper.

II. Whether the multi-member district adopted by Texas for Dallas County, Texas, unconstitutionally dilutes or cancels the votes of Black citizens.

III. Whether the multi-member district adopted by Texas for Bexar County, Texas, unconstitutionally dilutes or cancels the votes of the Mexican-American citizens who constitute a plurality of the citizens of Bexar County.

STATEMENT OF THE CASE

This case represents the fourth round[1] in the judicial forum of the decade-old and seemingly unending political struggle between the State of Texas and certain of its political groups over the State's efforts to comply with the mandate of the Equal Protection Clause of the Fourteenth Amendment. With one eye on the one-man, one-vote mandate of that Amendment, as explicated by this Court's prior decisions, and the other eye on the provision of its own constitution prohibiting the crossing of county lines, as explicated in a recent decision of the Texas Supreme Court,[2] the State of Texas adopted a plan with the lowest population variances available to it,[3] with what variances there were well within the limits established by this Court's prior decisions, and with only one, fully-explained departure from

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[1] *Round One:* Unreported decision invalidating apportionment of the Texas Legislature referred to in *Kilgarlin* v. *Hill*, 386 U.S. at 120 (1967).
Round Two: Kilgarlin v. *Martin*, 252 F.Supp. 404 (S.D.Tex. 1966), *rev'd sub. nom., Kilgarlin* v. *Hill*, 386 U.S. 120 (1967).
Round Three: Smith v. *Craddick*, 471 S.W.2d 375 (Tex. 1971).
Round Four: Bullock v. *Regester*, 343 F.Supp. 704 (W.D.Tex. 1972).

[2] *Smith* v. *Craddick*, 471 S.W.2d 375 (Tex.Sup. 1971).

[3] The record in this case is conclusive that the Board used the lowest population plan available to them that sought to comply with the state constitutional requirement of keeping county lines intact. The maximum deviations are 4.1% under the optimum and 5.8% over the optimum, and the total deviation is 9.9%. See note 9, *infra*. Following trial, some of the Republican appellees presented a plan for the state cutting one county line in northeast Texas and alleged to have an overall deviation of 9% as opposed to 9.9%. The lower court alludes to a plan (A.Jur.S. 61A, fn. 21) which contains only a 3.5% total deviation and which cuts only 23 county lines. The plan referred to was also presented after trial. The accuracy of neither of these plans has been checked, but the important thing is that neither was made available to the Legislative Redistricting Board, Texas' duly constituted redistricting authority whose "good faith" was attacked here.

the mandate of the state constitution.[4] In a plurality of opinions,[5] containing neither findings of fact nor conclusions of law and demonstrating that it was not so much the plan as the method by which it was adopted that was faulted,[6] the court below held that Texas must try — and undoubtedly litigate — again. And to do what? To arrive at a plan which attains precise mathematical equality, or alternatively be prepared to convince two out of three

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[4] The only departure made from the state requirement was made in northeast Texas. Bowie County (includes Texarkana, Texas) is bordered on two sides by the states of Oklahoma and Arkansas. Bowie County has a 1970 population of 67,318 (1970 CENSUS *op. cit. supra*), not enough for its own representative (9.15% under the optimum). The lowest population in any of the three Texas counties adjacent to Bowie County is 12,310 in Morris County. The total of these two counties is 80,123 (7.34% over the optimum). Morris County borders Bowie County only diagonally, and a district composed of these two counties would have adversely affected the overall flexibility of arrangement of other counties in the areas. Therefore, Red River County (population 14,298) was divided. It borders Bowie County on the west and Oklahoma on the north.

[5] District Judge Justice concurred in the court's opinion in all respects, with the exception of Part VI, with which he dissented. District Judge Wood concurred with the results of Parts III and IV "for the various reasons stated in the majority opinion" (Dallas and Bexar Counties multi-member districts), and dissented with the remainder of the opinion. Circuit Judge Goldberg specially concurred in the result of Part IV of the opinion.

[6] The trial court stated:

> "First, whatever 'tolerance' might conceivably attach to a State's explanation of deviations from a population ideal cannot reasonably or appropriately attach to the actions of a redistricting board which acted on the House of Representatives' plan only pursuant to a mandamus, *Mauzy* v. *Redistricting Board, supra,* and which proceeded to draw its conclusions in the manner just sketched. See *Silver* v. *Brown,* 1965, 46 Cal. Rptr. 308, 405 P.2d 132; *Legislature of the State of California* v. *Reinecke,* Sacramento No. 7917 [January 18, 1972]. See generally *Connor* v. *Johnson,* 1971, ... U.S. ....., 29 L.Ed.2d 268, 91 S.Ct. ..... We have serious doubts that this board did the sort of deliberative job con-

judges that every instance of departure from mathematical preciseness was in fact fully debated and explained during the legislative process and not only motivated by, but absolutely essential to effectuate, a rational state policy uniformly applied and not consisting of the respect for county lines which the Texas Constitution was heretofore thought to require. The broad issue presented by this appeal is whether legislative redistricting is a job of the elected representatives of the people or the data processors. Only the latter could obtain the perfection required by the lower court, for no matter how close the former could come, no matter how good-faith their efforts, there would always be some *de minimis* departure from precise mathematical equality, the motivation and justification for which would be obscured in the process of legislative compromise. It may well be too late for the federal courts to get out of

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templated by *Reynolds* as worthy of judicial abstinence." (A.Jur.S. 21A).

District Judge Wood answered this by stating:

"This overlooks the fact that this is a Board created under the provisions of Article III, Section 28, of the Constitution of Texas, for the purpose of redistricting the House and Senate of the State, where the Legislature in effect authorizes this Board to act, if the Legislature fails to do so. A most important element that this Court overlooks is that the officials who have been constitutionally designated to fill this vital role are five of the most prestigious officials elected by all of the people of the State of Texas, to-wit: the Lieutenant-Governor, the Speaker of the House of Representatives, the Land Commissioner and the Comptroller of Public Accounts, which Board acted in this case under the advice and counsel of the also democratically elected Attorney General of Texas. The Opinion concludes that we have serious doubts that this Board did a sort of deliberative job contemplated by *Reynolds* v. *Sims* as worthy of judicial abstinence. How the majority opinion reaches this conclusion from all the evidence in this case is a distinct mystery to me. In any event, the test is not the number of meetings or the type of 'deliberative job' done by the Redistricting Board." (A. Jur.S. 103A).

the political thicket. But if they are to remain there, they should either candidly recognize that any departure from precise equality is *per se* illegal or establish some permissible range within which they need not conduct an after-the-fact search for the golden bough of justification.

Article III, Section 2, of the Texas Constitution, sets the size of the Texas House of Representatives at 150 members. The Texas Constitution, Article III, Section 26, provides that members of the Texas House of Representatives shall be apportioned among the several counties according to the population in each, as nearly as may be, based on the most recent United States census,

> "provided, that whenever a single county has sufficient population to be entitled to a Representative, each county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

The last regular session of the Texas Legislature (1971) attempted to apportion the state into House districts. On September 16, 1971, its result was declared unconstitutional. *Smith* v. *Craddick*, 471 S.W.2d 375 (Tex. 1971) (A.Jur.S. 178F.) A main reason for this ruling was unnecessary cutting of county lines in rural areas in violation of the Texas Constitution, Article III, Section 26.[7]

[7] The state constitution requires that where a county has sufficient population to entitle it to a representative, the county itself shall be the representative district. If the county itself is too small to be entitled to a representative, it shall be joined with

While fully recognizing the supremacy of the federal law, the Texas Supreme Court said (A.Jur.S. 185F), "The federal requirement of equal representation clearly has not nullified Section 26 of Article III in its entirety." The Texas Supreme Court also said, speaking of the districting requirements of the state constitution (A.Jur.S. 184F), "if these districting requirements were excused by the requirements of equal representation, the appellants (the state officials) had the burden of presenting that evidence."

The Legislative Redistricting Board of Texas (hereinafter referred to as the Board) attempted to satisfy both federal and state constitutions.[8] The result is a reapportionment of the state that makes only one division of a small county in contravention of Article III, Section 26, of the state constitution, yet keeps all districts within a maximum variation ranging from a low of 4.1% under

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one or more contiguous areas to compose a representative district. If a county has excess population, it is entitled to have as many districts as its population warrants within its county lines, and the excess may then be joined with a contiguous area. An example given in *Smith* v. *Craddick*, 471 S.W.2d at 378, was that if a county has 100,000 population and the optimum district is 75,000, a 75,000 population district should be formed entirely within the county and the area containing the excess 25,000 may be joined to a contiguous area. The court below was of the opinion that the State had not adhered to *Smith* v. *Craddick* because the excess population in four instances was split between two contiguous districts rather than all going into one contiguous district. The example given by the court in *Smith* v. *Craddick*, however, was directed to explaining the handling of the 75,000 population that would comprise a district within the county. The handling of the excess is clearly stated as permissive rather than mandatory.

[8] In *Mauzy* v. *Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971), the Texas Supreme Court directed the Board to redistrict the State in accordance with its guidelines set forth in *Smith* v. *Craddick*, 471 S.W.2d 378 (1971).

the optimum to a high of 5.8% over the optimum (Table, A.Jur.S. 153C-155C).[9]

Thereafter, these actions were brought under the Equal Protection Clause of the Fourteenth Amendment and 28 U.S.C. § 1983. The appellees alleged that the districting of Texas into districts for its 150-member House of Representatives was defective because of unjustified population variances between districts and because the use of multi-member districts in Dallas and Bexar Counties discriminated against black people and Mexican-Americans. The

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[9] The optimum computed by dividing the population of the state (11,196,730) by the number of House districts (150) is 74,645. The least populous district has a population of 71,597. The most populous district has 78,943. The least percentage of the population of the state that can in theory elect a majority of the Texas House of Representatives is 49.89% (based on the total population of the 76 lowest population districts). The average deviation, plus or minus, of all districts is 1,356 or 1.82%. The lower court, though accepting it as correct for the purpose of decision, expressed some doubt about the way used by the state to compute the deviation in multi-member districts (A.Jur.S. fn. 5, 13A). For example, Dallas County with 1,327,321 people was given eighteen representatives. Eighteen times the state optimum totals 1,343,610. 1,343,610 minus 1,327,321 equal 16,289. 16,289 divided by the optimum (74,645) equals .21+, thus it is said that there may exist in Dallas County a 21+% deviation. The state divided the total population of Dallas County by eighteen and arrived at an average figure that is 1.2% under the optimum. (Dallas County grew in population 39.5% from 1960 to 1970, 1970 CENSUS *op. cit. supra* 3). The state's computation method seems in keeping with this Court's thinking in *Whitcomb* v. *Chavis*, 403 U.S. 124, 144 (1971), ". . . that Fortson, Burns and Kilgarlin proceeded on the assumption that the dilution of voting power suffered by a voter who is placed in a district 10 times the population of another is cured by allocating 10 legislators to the larger district instead of the one assigned to the smaller district." The state's method has been approved, *Kelly* v. *Bumpers*, (E.D. Ark., Civil No. LR-71-159, March 21, 1972).

trial court sustained the appellees' attack;[10] imposed single-member districts in Dallas and Bexar Counties by judicial order; and ordered that the Texas Legislature reapportion the entire State by July 1, 1973, on penalty of the court's districting the State if the legislature has not acted.

There is no evidence that any voter or group of voters was adversely affected by the population variances nor was there any evidence that use of multi-member districts was intended to discriminate against anyone. Therefore, the only issues presented in this appeal are: (1) whether the State had the burden to justify any and all of the small population variances; (2) if so, whether it has sufficiently done so; and (3) whether the use of multi-member districts has a discriminatory effect in fact.

SUMMARY OF ARGUMENT

The court below concluded that "the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote' . . ." (A.Jur.S. 60A). The trial court construed its inquiry into the constitutionality of the Texas plan to be: "Has the State justified any and all variances, however small, on the basis of a consistent, rational State policy?" (A.Jur.S. 14A). The court held that the preservation of county lines is not a *per se* justification for a population deviation, that Texas had not demonstrated a rational and consistent reason for maintaining its county lines at the admitted expense of greater disparities in population deviations, and ultimately

[10] The plan of the Board was also attacked by Curtis Graves, a black State Representative from Harris County, challenging the apportionment of Senatorial districts in Harris County because of alleged racial gerrymandering. This attack was not sustained. (A.Jur.S. 58A-60A). The State Senate Districts in Bexar County were attacked by the San Antonio Republicans, alleging political gerrymandering. This attack was similarly not sustained. (A.Jur.S. 56A-58A).

concluded that the "State has failed to establish any rational and consistent state policy that would explain, let alone justify, its deviations from the constitutional principles of *Reynolds* and its progeny." (A.Jur.S. 22A). The court below, purely and simply, held the Texas plan to a standard expressly rejected by this Court in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), and yet cited *Reynolds* v. *Sims,* as the basis for its holding.

After erroneously placing a burden of justification on the State, in view of the minimal deviations involved, the Court below refused to accept the preservation of county or other local political subdivisions as *a* justification, refused to accept the Texas constitutional prohibition against crossing certain county lines as *a* justification, and refused to accept the decision of the Supreme Court of Texas in *Smith* v. *Craddick,* 471 S.W.2d 375 (Tex. 1971), as any justification. The Court has not held that a State must justify *"any and all variances, however small."* The trial court judgment must be set aside because the Texas plan is within acceptable deviation limits, and such deviations as are present are justified by a rational State policy.

The court below also invalidated the multi-member House districts in Dallas and Bexar Counties, and divided those counties into single-member districts. With regard to Dallas County, the court based its holding on its conclusion that the multi-member district "tends to dilute or cancel out the vote of Dallas County's Negro minority." (A.Jur.S. 42A). A point-by-point comparison between this case and *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), however, demonstrates that the conclusion reached by the trial court was unjustified. Negroes in Dallas County are in no way inhibited in their exercise of the rights to register, to vote and to associate politically. Blacks participate in the Dallas County political process, they run for and are elected to political offices, and their interests are represented. Under

the guidelines of *Whitcomb*, the multi-member district in Dallas County was not shown to be constitutionally infirm.

The court's invalidation of the multi-member district in Bexar County is similarly insupportable under the guidelines of *Whitcomb*. The court, however, made no effort to conform its findings with regard to Bexar County to those specified by the Court in *Whitcomb*. Instead, the court based its holding on findings that Mexican-Americans constitute an identifiable ethnic minority, they have suffered discrimination in the past, and single-member districts will "be of benefit in remedying the effects of past and present discrimination" (A.Jur.S. 56A) and will assure Mexican-Americans of representation of their interests in the Texas House. These bases do not meet the *Whitcomb* requirements for a conclusion of unconstitutionality.

The only means of supporting the trial court's decision is on a *per se* basis, which has been consistently rejected by this Court, and absent a rule of *per se* invalidity, the multi-member districts in Dallas and Bexar Counties are not constitutionally infirm and the judgment of the trial court must be set aside.

ARGUMENT

I

POPULATION VARIATIONS BETWEEN LEGISLATIVE DISTRICTS OF THE SIZE PRESENT IN THIS CASE, RESULTANT FROM AN EVENHANDED APPLICATION OF A PROVISION OF THE TEXAS CONSTITUTION DESIGNED TO PRESERVE THE INTEGRITY OF SMALL COUNTIES, DO NOT INDICATE UNFAIR REPRESENTATION NOR DENY THE "EQUAL PROTECTION OF THE LAWS."

The Texas House of Representatives is composed of 150 members, Article III, Section 2, Texas Constitution, and

the 1970 Census reported the population of Texas to be 11,196,730. Therefore, the optimum Representative District in Texas would contain 74,645 persons. The apportionment plan prepared by the Legislative Redistricting Board of Texas contains a maximum deviation of 4.1% under the optimum (District 85) and 5.8% over the optimum (District 3), for a total deviation of 9.9% or a deviation ratio of 1.1 to 1. The overall plan contains an average deviation of 1.82%. There is no evidence concerning the effects of population deviation and the questions are first whether a State must justify at all deviations as small as those present in the Texas apportionment plan and secondly, if a State must justify such deviations, whether or not a conscientious effort to evenly apply long-established state policies, particularly against partition of small rural counties, is an acceptable reason for the small deviations present in the Texas districting plan.

A. Reynolds v. Sims, And Its Progeny Do Not Require Precise Mathematical Equality And Do Recognize The Preservation Of Political Subdivision Lines As A Legitimate Justification For Population Deviations.

In *Reynolds* v. *Sims,* 377 U.S. 533 (1964), whose constitutional principles the trial court found Texas had not met, the Court was confronted with an apportionment scheme from the State of Alabama with population variance ratios of up to 41 to 1 in the Alabama Senate and up to 16 to 1 in the Alabama House. Alabama had not been reapportioned for over 60 years. The Court, using the Alabama situation as its vehicle, set out to determine the basic standards and guidelines for implementing *Baker* v. *Carr,* 377 U.S. 559 (1962). The standards and guidelines laid out in *Reynolds* makes it evident that the court below was in error in requiring the State to justify *"any and all variances, however small."* (A.Jur.S. 12A).

The holding in *Reynolds*, as set forth by Mr. Chief Justice Warren, is:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. at 568.

Thereafter, the guidelines for apportioning on a population basis were set forth by the Court at 377 U.S. 577-79:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make *a honest and good faith effort* to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness of precision is hardly a workable constitutional requirement.*
>
> "In Wesberry v. Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as *enunciated* by the Court in Wesberry — equality of population among districts — some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, *it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting* while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based *substantially* on population and the equal-population principle was not diluted

in *any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting . . .*

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be *substantial equality* of population among the various districts, so that the vote of any citizen is *approximately equal* in weight to that of any other citizen in the State." (Emphasis added).

Thus, not only did *Reynolds* expressly reject precise mathematical equality, it expressly recognized the preservation of political subdivision lines as a justification for deviation. Nonetheless, after concluding that *Reynolds* requires absolute mathematical equality, the court below then interpreted *Swann* v. *Adams,* 385 U.S. 440 (1967), to require that "whenever the fact of deviation from population equality is raised the burden falls upon the State to present 'acceptable reasons for the variations among the populations of the various legislative districts.' " (A.Jur.S. 10A). Thus while *Reynolds* recognizes that absolute mathematical equality is a practical impossibility, the court below interprets *Swann* to require the State to justify *any* deviation therefrom. That means that there is a presumption of invalidity and unconstitutionality attached to every appor-

tionment plan, that the State always has the burden of proof, and that a considerable amount of time and energy is going to be spent by federal courts in accessing explanations as to why the impossible was not attained. Such is not the requirement or implication of *Swann* v. *Adams*.

Swann v. *Adams* involved the apportionment of both the Florida Senate and House. The Senate deviations ranged from 15.09% over the optimum to 10.56% under the optimum, for a total deviation of 25.64%. The House deviations ranged from 18.28% over the optimum to 15.27% under the optimum, for a total deviation of 33.55%. The plan had been upheld by the district court on the basis that the variations were not great enough to require invalidating the apportionment plan. The Court stated at 385 U.S. 444:

> "*De minimus* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimus*, and none of our cases suggest that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."

Thus, *Swann* dictates that when deviations of the magnitude of 30-40% are presented, the State must satisfactorily show a valid state policy requiring such deviations. The case does not require a state to justify "*any and all variances, however small.*" *De minimus* deviations need not be justified since they are, as a practicable matter, unavoidable, but the Court did not specify what was *de minimus*.

Accordingly, for the final step to bridge the chasm between *Reynolds* and the standard set forth by the court below, the following was cited from *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), (A.Jur.S. 11A):

> "We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimus*. Moreover, to consider a certain range of

variances *de minimus* would encourage legislators to strive for that range rather than for equality as nearly as practicable . . .

• • •

"[T]he 'as nearly as practicable' standard requires that the State make a good faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). Unless population variances among . . . districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small . . .

• • •

"[The Constitution] permits only the limited population variances which are unavoidable despite good faith effort to achieve absolute equality, or for which justification is shown. [The omission by the trial court in the second quoted paragraph is the word 'congressional']."

B. Kirkpatrick v. Preisler Does Not Compel Invalidity Of The Texas Apportionment Plan.

Kirkpatrick, which the trial court felt "may substantially erode the 'tolerance' dictum in *Reynolds*" (A.Jur.S. 12A), is applicable authority for this case only if there are to be no distinctions drawn between congressional and legislative representation, in direct contradiction to *Reynolds* and its progeny, and only if it stands for the principle that any deviation, however small, creates a virtually irrebuttable presumption of bad faith and constitutional infirmity. *Kirkpatrick*, however, does not go so far. It requires a "good faith" effort to achieve mathematical equality, it permits variances which occur despite good faith efforts, and it requires justification from the State only when there has not been a good faith effort to achieve mathematical equality. Moreover, *Kirkpatrick* involved congressional redistricting, and as stated by this Court in *Reynolds*, 377 U.S. at 578:

> "[S]ome distinctions may well be made between congressional and state legislative representation."

In *Connor* v. *Williams*, ... U.S. ....., 92 S.Ct. 656 (1972), the Court observed at ..... U.S. ..... 92 S.Ct. 658:

> "Appellants rely on our recent cases invalidating congressional redistricting statutes that contained total deviations of 5.9%, Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 11 L.Ed.2d 519 (1969), and of 13.1%, Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 33 L.Ed.2d 535 (1969), between the largest and the smallest districts. *These decisions do not squarely control the instant appeal since they do not concern legislative apportionment . . .*" (Emphasis added).

See also *Whitcomb* v. *Chavis*, 403 U.S. 124,162 (1971).

Congressional redistricting is based upon Article I, Section 2 of the Constitution, while state redistricting is based upon the Equal Protection Clause of the Fourteenth Amendment. There are fewer congressional districts than state legislative districts within a state, and thus percentage deviations should usually be smaller in congressional redistricting. Local interests are of greater importance on the state level, and hence the preservation of local political subdivisions is somewhat more important than in congressional districts.[11]

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[11] This was recognized by the New Jersey Supreme Court in *Jackman* v. *Bodine*, 55 N.J. 371, 262 A.2d 389 (N.J. 1970):

> "Nonetheless the county and the municipality are the meaningful units in state-local relations in many . . . situations, and elections from districts are more worthwhile if the county and the municipality are reflected in drawing the lines."

Moreover, as pointed out in *Reynolds* v. *Sims*:

> "[I]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U.S. at 578-79.

Thus, the standards of congressional districting should not be determinative of state districting.

If, however, the standards of *Kirkpatrick* might be applicable to State legislative redistricting, its standard of "good faith" has indisputably been met by the State of Texas. The Missouri Legislature in *Kirkpatrick* was found not to have acted in good faith and to have relied on inaccurate statistical information. "Indeed, it [was] not seriously contended that the Missouri Legislature came as close to equality as it might have come." 394 U.S. at 531. There is absolutely no evidence of lack of good faith on the part of the Board in this case,[12] unless the rule is said to be that a redistricting authority is presumed guilty of bad faith until the contrary is overwhelmingly shown. Surely, the term "good faith" in apportionment cases means the same as in other areas of the law. Only one member of the Board was subject to the legislative plan — the others held state-wide offices and, thus, they had no vested personal interest to protect. It is not credible that *Kirkpatrick*, in condemning the specific Missouri action before it, intended to create a virtually irrebuttable presumption of bad faith on the part of all apportioning authorities.

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[12] The only things the court below said which even remotely touch on the issue of good faith were its criticisms of the manner in which the Board conducted its deliberations and its suggestion that the Board ignored the assurance given by the State in *Kilgarlin* that whenever a county attained a population in excess of a million residents, it would be subdivided into single-member districts. As to the first criticism, see note 6, *supra*. As to the latter, the court in *Kilgarlin* did not purport to rely on any long-standing State policy but rather simply recognized that the population distinction found in the particular redistricting bill then being challenged was rational under the circumstances. It did not suggest that a population distinction based upon 1960 census figures would wed the State for all time to the very same distinction in all subsequent redistricting schemes. To suggest, as does the court below, that a distinction drawn and found rational in 1965 represents "an existing state policy" to which a new legislature must remain faithful in 1971, is to substitute historical consistency for rationality.

Since Texas did not achieve precise mathematical equality, and regardless of its good faith effort to do so consistent with a subordinated State policy of preserving county lines, the trial court held it to the burden of justifying "any and all variances, however small",[13] and then summarily rejected the justifications. The trial court held that the preservation of county lines was not a *per se* justification, and thus refused to accept the preservation of county lines as *any* justification. The latter does not logically flow from the former. The State of Texas has never contended that the preservation of county lines would justify deviations of unlimited magnitude. Indeed, the Texas Supreme Court specifically recognized that the crossing of some county lines, in violation of Article III, Section 26, of the Texas Constitution, might be necessary to achieve the substantially equal representation required by the Equal Protection Clause, and recognizing the supremacy of the federal law, acknowledged that such crossing would be accomplished, although it should absolutely not be done unnecessarily. The preservation of county lines and population equality as nearly as practicable are not necessarily anathema to one another, but can be accomplished together. The predominant goal of the Board was substantial population equality, with *de minimus* deviations to preserve county lines. If the Texas justification is not constitutionally valid, then there can be no constitutional State justifications as a practical matter.

Moreover, the policy in Texas of preserving county lines in legislative districting enjoys a more rational and legitimate basis than did Missouri's congressional districting

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[13] The trial court considered deviations of 3.7% and 4.1% under the optimum in Harris County, one of the most rapidly growing areas of Texas, to be "large" and "insupportable". (A.Jur.S. 18A).

policy in *Kirkpatrick*. First, the Texas policy is required by the Texas Constitution. Secondly, a prior redistricting plan was declared unconstitutional by the Texas Supreme Court, *Smith* v. *Craddick*, for unnecessarily crossing county lines, and future Texas redistricting authorities were warned to cross county lines only where absolutely necessary. Conversely, Missouri's congressional districting plan policies were apparently afterthoughts based upon the argument recognized in *Reynolds* that the preservation of local political subdivision lines would minimize the opportunity for gerrymandering. Moreover, it was clear that Missouri could easily have come closer to mathematical equality by simply moving *entire* contiguous counties, thus *still* preserving its county lines. Lower deviation plans that preserved subdivision lines were before the Missouri Legislature and were rejected. The refusal of the Court to accept Missouri's makeweight justification is not determinative of the justification for deviation shown by Texas. It is not necessary that the State convince the trial court of the rightness of the Texas policy of preserving county lines.[14] It is enough that the policy is legitimate, it is rational,[15] and

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[14] The trial court viewed the real question as: "Has Texas demonstrated a rational and consistent reason for maintaining its county lines at the admitted expense of greater disparities in population deviations?" It also criticized *Craddick* for making "no effort to explain any rational state policies that may be ensconced in Article III, § 26 of the Texas Constitution . . ." Of course, the preservation of political subdivision lines will by its very nature create "disparities" in population, and thus the court was really questioning whether Texas had a "rational and consistent reason" for Article III, Section 26, of the Texas Constitution. The court apparently would require not only a rational state policy, but also a "rational and consistent reason" for having the national policy.

[15] In *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), this Court left undisturbed the trial court's finding: "that Section 26 embodies the State policy to maintain the integrity of counties and county lines, that such is a rational policy . . ." *Kilgarlin* v. *Hill*, 252 F.Supp. 404, 427-28 (S.D. Tex. 1966).

it was subordinated to the primary policy of substantial population equality. No one would contend that respect for county lines would justify a 50% deviation and the question is not whether county integrity is a total justification for any variation however large. Nevertheless, where, as here, the deviations are not large, county integrity, based upon a legitimate rational state policy, must be viewed as justification for some deviation.

C. If Kirkpatrick Requires Justification Of All Departures From Precise Mathematical Equality, Notwithstanding The Good Faith Of The Districting Authority, It Should Not Be Extended To Legislative Apportionment Because It Would Provide An Impractical And Unworkable Standard In That Context.

If the precise mathematical standards of *Kirkpatrick* place upon the State the burden of justifying "any and all variances, however small," and however good faith the State's efforts to achieve mathematical equality, and further, if the preservation of county integrity based upon a rational state policy is not only insufficient justification for small deviations, but is no justification at all, then it is time either to reexamine the standards of *Kirkpatrick* or to hold that it does not apply to state legislative districting.[16] If *Kirkpatrick* is interpreted to require absolute precise mathematical equality *per se*, and the failure to achieve such equality establishes bad faith, or lack of good faith, then there are no state policies worthy of con-

[16] This Court clearly indicated this question was not decided when it stated in *Connor* v. *Williams*, ... U.S. ....., 92 S.Ct. 656, 658 (1972):

> "If we are to consider the applicability of *Preisler* and *Wells* to state legislative districts, it would be preferable to have before us a final judgment with respect to the entire State."

sideration as justification for deviation. Such standards are impractical and unworkable in the arena of legislative apportionment.

First, the *Kirkpatrick* standards, as interpreted by the lower court, sacrifice the basic objective of "fair and effective representation for all citizens" and substitute in its place a meaningless standard of arithmetical preciseness. But "Mathematical exactness or precision is hardly a workable constitutional requirement." *Reynolds* v. *Sims*, 377 U.S. at 577. Mr. Justice White, in his dissent in *Kirkpatrick*, observed that if "county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from the other, but each having its own very different political ramifications." 394 U.S. at 556. Thus, mathematical preciseness does not *per se* achieve fair and effective representation.[17]

Moreover, precise mathematical equality should not be an end in and of itself, because even precise equality based upon Census data may well be only substantial equality, or even insubstantial equality, on a practical

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[17] This was recognized by the trial court when it pointed out that a State would have the burden of justifying, as having a rational basis, even a computer-perfect, mathematically-equal districting plan:

> "Arguably, the Fourteenth Amendment forbids a plan that reflects 'no policy, but simply arbitrary and capricious action,' Baker v. Carr, 1962, 369 U.S. 186, 226, 82 S.Ct. 691, ..., 7 L.Ed.2d 663, 691, Reynolds v. Sims, supra, and which is not 'free from any taint of arbitrariness or discrimination,' Roman v. Sincock, supra, entirely independent of any population deviations: 'To the extent that a state's legislative apportionment plan is conclusively shown to have no rational basis, such a plan violates the equal protection clause.' Davis v. Mann, 1964, 377 U.S. 687, 694, 84 S.Ct. 1453, ..., 12 L.Ed.2d 609, 619 (concurring opinion). Cf. Swann, supra, at 572." (A.Jur.S. 22A).

basis. For example, minorities have traditionally been undercounted in censuses. Pritzker and Rothwell, "Procedural Difficulties in Taking Post Census in Predominantly Negro, Puerto Rican and Mexican Areas," *Social Statistics and The City,* (Heer Ed. 1968). Texas has substantial Negro (13%) and Mexican-American (18%) minorities. Further, actual population figures are not an accurate correlation to the actual number of persons eighteen years old and over, and hence eligible to vote. Thus, the equalization of district to exact mathematical preciseness does not mean equalization of voting power, and equalization of voting power is the foundation of the legislative apportionment cases. Moreover, since the Census is taken at 10-year intervals, a Census would be used as a basis for apportionment for elections occurring during this entire period. However, district populations grow at different rates, only in small part predictable, and precise mathematical equality (or as near as Census data permits) in 1972 may be grossly unequal in 1980. This was clearly shown with regard to the Missouri situation involved in *Kirkpatrick.* In 1969 this Court struck down a variation of 25,802 people between the highest and lowest congressional district and required the Missouri Legislature to reapportion on the 1960 Census figures. It did, and its new 1969 plan was approved by the lower court as complying with *Kirkpatrick.* When the 1970 census figures were in, it was found that districts approaching equality under the 1960 census varied as much as 228,314 persons, and that the difference between only two of Missouri's ten districts was less than that invalidated by *Kirkpatrick.*[18] Figures such as these absolutely explode the notion that small population variances are of any real meaning. Another re-

[18] Appendix to Jurisdictional Statement at 3, *Danforth* v. *Preisler,* (No. 71-1396, *aff'd* 40 U.S.L.W. 3582, June 13, 1972).

vealing example of the rough nature of raw census figures is provided by a comparison of two diagonally touching single-member districts in Harris County, Texas, districts 90 and 93. The total population of district 90 (74,377) is .4% under the optimum for a Texas Legislative district (74,645) and 2.2% greater than the total population of district 93 (72,761) (which is 2.5% under the optimum). The number of persons of voting age in district 90 is 55,681; the number of persons of voting age in district 93 is 39,767. In percentages, district 90 has 2.2% more people than district 93 but has 40.2% more people of voting age. Report No. 01140687, Office of Information Services of the office of the Governor of Texas (extract of population data from the First Count Tapes of the 1970 Census by population of persons eighteen years and over). The variations in numbers of persons of voting age in legislative districts vary rather widely throughout the state even though the districts are of substantially equal overall population. (See Report No. 01140687, Office of Information Services of the Office of the Governor of Texas (extract of population data from the First Count Tapes of the 1970 Census by population of persons eighteen years and over).

The above is submitted, not as a guide for further refinement of the exact equalization process, but rather as indicative of the futility of the quest after exact precise mathematical equality. Precise mathematical equality is not, or should not be, the goal under the Fourteenth Amendment. Fair and effective representation for all citizens is the basic aim of legislative apportionment. *Reynolds* v. *Sims*, 377 U.S. at 565-66. This goal is not to be attained by blind adherence to arithmetic, but rather by a recognition of practicalities of political processes and a goal of substantial equality in light of these practicalities. Any plan drawn

for submission to a districting authority will have political effect. Those members of the authority having familiarity with given areas will have greater knowledge of political impact in those given areas and adjustments will in all probability need to be made to insure fair representation of the people. Yet if there is no play in the joints of government such adjustments cannot be made. Even relatively minor adjustments between districts proposed cannot be made because of a ripple effect over the whole state. The process of compromise — the life blood of practical politics — is most applicable to political choices, and some small palpitations in numbers are necessarily reflected by its workings in the legislature districting. A standard of precise mathematical exactitude, besides being unworkable as a practical matter, has a wholly undesirable and unavoidable tendency to stiffle legislative process.

It is wholly unsound and impractical to say that there is no point short of absolute mathematical equality of population where considerations of substantial population equality achieve parity with community of interest, political subdivision lines, and the other things that should be considered in an effort to achieve fair representation. If this Court approves the rule of mathematical precision applied *per se* by the lower court it will be abandoning the good it has done and will be repudiating the wisdom of *Reynolds* v. *Sims*, 377 U.S. 533, 578 (1964) in not setting precise constitutional tests, as opposed to viewing each case on its own merit. A rule of precise mathematical equality, as applied by the lower court, amounts to a presumption of invalidity and furnishes that presumption as a substitute for evidence where neither side can by any objective proof establish the effect, or lack of effect, on legislative action, of a particular small population variance. Therefore, a rule of precise mathematical equality in legis-

lative districting not only misplaces the burden of proof in instances of trivial population variance, it furnishes by irrefutable presumption, its own proof that any districting plan judged by a rule of precise mathematical equality is invalid.

In summary, the plan here under attack contains an average deviation of only 1.82% and attains the apportionment goal of substantial equality. Further inquiry is not required, but even so, Texas has justified these small deviations on the basis of compactness, contiguity, and the rational and legitimate state policy of preservation of county lines. To hold these deviations to be constitutionally infirm is to require precise mathematical equality as the *only* constitutional apportionment basis — anything less must fall. Appellant does not believe this to be the law, but if it is, it should not be. Absolute precise mathematical equality is an impracticable standard which ill serves the goal of fair and effective representation for all citizens.[19]

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[19] While the Court in *Kirkpatrick* was hesitant to specify any *de minimus* deviation range for fear that the State legislatures would "strive for that range rather than for equality as nearly as practicable," 394 U.S. at 531, to require the rational and consistent justification of all deviations "however small" is to encourage legislatures to opt out in favor of the courts and computers. It is respectfully submitted that it is perfectly consistent to require legislatures to aim for "equality as nearly as practicable" and yet to apply a *de minimus* standard to the end product. If it could be demonstrated, as it was in *Kirkpatrick*, that the legislature started out aiming for less than equality, such a showing would certainly negate any presumption of good faith, and it would not be unfair to require the State to come forward with justification of all deviations. However, where the State aims for equality (as it is undisputed Texas did here), but slightly misses, it is not unreasonable to shift the burden of proof to the challengers. Appellants do not seek a rule of *per se* legality, but only a shift in the burden of proof as to those trivial variances, the required justification of which would amount to a rule of *per se* illegality.

II

NO UNCONSTITUTIONAL DILUTION OR CANCELLATION OF THE VOTING POWER OF AN ETHNIC GROUP IS SHOWN TO RESULT FROM THE USE OF MULTI-MEMBER DISTRICTING IN DALLAS COUNTY WHERE THERE IS NO EVIDENCE NEGROES HAVE BEEN DENIED EFFECTIVE PARTICIPATION IN THE POLITICAL PROCESSES AND THE LOWER COURT FINDS NO FACTS TO SUPPORT ITS CONCLUSIONS AND SPECULATIONS THAT SUCH DILUTION OR CANCELLATION HAS OCCURRED.

The trial court invalidated Texas' use of a multi-member district in Dallas County on the ground that the use of such a district "tends to dilute or cancel out the vote of Dallas County's Negro minority." (A.Jur.S. 42A). While the trial court purported to follow *Whitcomb* v. *Chavis,* it clearly departed therefrom by (1) placing upon the State the burden of "showing that the interests of the black ghetto, like those of the white areas, are taken into consideration in the formulation of the entire slate" of primary candidates (A.Jur.S. 41A), and (2) equating permission "to enter the political process . . . only through the benevolence of the dominant white majority" (*ibid.*) with "being denied access to the political system," 403 U.S. at 155.

Unlike the trial court in *Whitcomb,* the court below made no findings of fact as such and therefore it is difficult to ascertain precisely where philosophical speculation ends and factual determination begins. And since the lower court felt compelled to express its judicial distaste for the "majority" and the "place" requirements and absence of a subdistrict residential requirement in Texas elections, to chronicle what it deemed to be Texas' "rather colorful his-

tory of racial segregation,"[20] and to note what it sensed to be a general hostility toward the black community in Dallas politics, it is difficult to determine whether the court applied *Whitcomb* or its own standards of morality and propriety in arriving at its ultimate conclusion of invalidity.[21]

While it is impossible to divine precisely what the trial court did find and what findings it relied upon, it is rather easy to perceive what the court did not purport to find, and to demonstrate that what this Court found missing in *Whitcomb* is similarly absent here:

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[20] The trial court's recitation of Texas history is accurate but ancient. It is true that Blacks were effectively excluded from the political process during the first half of the 20th Century (R. 290-91), but it is equally true that the most recent incident involving resistance to a Negro's right to vote was 1956 (R. 348). It was stipulated that there has been no interference with the voting rights of black people in recent years, and one of the black plaintiffs testified that he knew of no effort to keep black people from voting (Conrad's Dep. 21) and that black people now have access to the political system and the opportunity to vote (Conrad Dep., p. 21).

Nevertheless, ignoring the present and focusing on the past, the court below stated that such history of discrimination against blacks made it "not unlikely that Texas' use of multi-member districts . . . unconstitutionally infringes the voting rights of racial *and political* minorities in *all* Texas cities that are districted as multi-members." (A.Jur.S. 39A) (Emphasis added). While the court found it unnecessary to rest its decision on such a holding, it is difficult to assess the effect this had on what the court did hold. One thing is clear: the rules of the political game criticized by the trial court (such as multi-member districts, the "place" requirement, and the "majority" requirement) were all established during an era when the Negro was — by virtue of other rules long-since struck down — voiceless and voteless. Clearly the rules criticized by the trial court were not designed to discriminate against Blacks — that had already been thoroughly accomplished.

[21] For instance, while the trial court did not feel compelled to do so, it did devote the entirety of Part II of its opinion to an explanation of why it would strike down any redistricting plan

(1) The record does not show, nor does the trial court suggest, that Texas' use of multi-member districts in Dallas County or elsewhere was "conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S. at 149.[22]

(2) There is nothing in the record or in the trial court's opinion to indicate that "Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs. . . ." 403 U.S. at 149.[23]

(3) The trial court did not find that "the Democratic

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which utilized multi-member districts in some metropolitan areas and single-member districts in others. According to the court, such divergent treatment — as was made between Harris County with single-member districts and other large cities with multi-member districts — would constitute a discrimination among candidates on the basis of wealth. The trial court recognized the novel nature of its decision and distinguished *Whitcomb* and *Kilgarlin* on the basis that such a contention had not been discussed in those cases. Of course, this issue is not now before the Court, but again it is difficult to determine the extent to which the trial court stretched *Whitcomb* in Part III, dealing with Dallas, to accomplish the result it felt required by its far-reaching analysis in Part II.

[22] Even the trial court recognized that "effect" on racial minorities, if any there was, would not be sufficient to invalidate a districting scheme. (A.Jur.S. 58A). Some evidence of "intent" or design would be required. The trial court, however, did not specifically refer to "intent" or design with regard to multi-member districts, but did consider intent with regard to the Harris County Senatorial districts, and concluded there had been no showing that the senatorial districts either operated or were designed to dilute the vote of the black minority. If the Board were not racially motivated with regard to the senate districts, it seems inappropriate to infer that it was racially motivated with regard to the Dallas multi-member House district.

[23] Pretrial Order §(a)3, *Curtis Graves, et al.* v. *Ben Barnes, et al.*, Civil Action No. A-71-CA-142; Pretrial Order §(a)7, *Diana Regester, et al.* v. *Bob Bullock, et al.*, Civil Action No. A-71-CA-143; Pretrial Order §(a)7, *Van Henry Archer, Jr., et al.* v. *Preston Smith, et al.*, Civil Action No. A-71-CA-145.

Party could afford to overlook the ghetto in slating its candidates." 403 U.S. at 150.[24]

(4) The evidence did not show nor did the court find that Blacks "were *regularly* excluded from the slates of both major parties. . . ." 403 U.S. at 150.[25]

(5) The evidence did not show nor did the trial court find that the Democratic Party "failed to slate candidates satisfactory to the" Blacks of Dallas County. 403 U.S. at 152.

(6) There was nothing in the evidence or the trial court findings to indicate what Dallas County Blacks' "interests were in particular legislative situations and nothing to indicate that the outcome would have been any different" if Dallas' 18 legislators "had been chosen from single-member districts."[26] 403 U.S. at 155.

The trial court basically made five "findings," or rather "conclusions," with regard to the Dallas evidence that it considered meaningful in accordance with the standards of *Whitcomb*: (1) That the number of black community

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[24] Rev. Brown testified that members of the black community participate in making up the DCRG slate. (R. 904). Mr. Allen, a member of the black community, participated in choosing Joe Lockridge, a black, for the DCRG slate. (R. 709). Mr. Weiser testified that Democratic candidates must have the votes of the black community in order to win in Dallas County. (R. 250). There were blacks included on the DCRG slate. (R. 421, 709). Obviously, the black community was not "overlooked" in the slating of candidates by the Democratic party.

[25] Dr. Conrad, a black, had been elected to the Dallas School Board (R. 390). Mr. Allen, a black, had been elected to the Dallas City Council (R. 685). Joe Lockridge (R. 709) and Rev. Holmes (R. 421), both blacks, had been elected to the Texas House of Representatives as Democrats with DCRG endorsement. Joe Kirving, a black, ran for the Texas House as a Republican, but was defeated (R. 405-06).

[26] See notes 31 and 35, *infra*.

residents who have been legislators is not in proportion to the number of ghetto residents; (2) That white candidates endorsed by the Dallas Committee for Responsible Government (DCRG)[27] in either a primary or general election can win in a county-wide race without appealing to the Negro vote; (3) That the interests of the black ghetto are *never* considered in the formulation of the *entire* slate of primary candidates by the DCRG; (4) That the black community participates in the selection of Democratic primary candidates only in the recruiting process and has no say as to how many Negroes, if any, will be slated; and (5) That there has been a recurring poor performance on the part of the Dallas County delegation concerning the representation of the black interests in the Texas House of Representatives.

The first "finding" is undoubtedly correct but, in and of itself irrelevant under *Whitcomb*.[28] The second "finding"

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[27] The DCRG was described as follows by Senator Oscar Mauzy, a member of the Texas Senate from Dallas County whose candidacy the DCRG consistently opposed and who served as counsel to some of the plaintiffs in this case:

"A. Judge Justice, I was a member of the Democratic Executive Committee myself from 1962 to 1966 as a precinct chairman, and it was during that period of time that the DCRG was formed by a group of individuals who were precinct chairmen of the Dallas County Democratic Executive Committee. Since then I have not had personal contact with it except through the mailings that they put out and press releases and things of that kind. As I understand it, they are a group of individual citizens, some of whom are Democratic Party office holders and some of whom are not, who seek to influence the nomination of candidates for the Democratic Party, for nominees for state representatives in Dallas County and who seek to influence the elections of individual precinct chairmen, and in some instances seek to influence the nomination of other Democratic nominees for public office in Dallas County." (R. 384-85).

[28] "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and

has some support in opinion evidence,[29] but likewise is irrelevant under *Whitcomb*.[30] The third "finding" is clearly

findings that ghetto residents had less opportunity to participate in the political processes and to elect legislators of their choice." 403 U.S. 149.

[29] This "finding" is apparently based on the opinion of Don Weiser, a mathematician, that a white candidate hostile to the black community can win (R. 220) and Senator Mauzy's statement that it was possible to ignore the black community and still get the Democratic nomination (R. 339). However, Weiser agreed that based on his analysis of the votes, removal of the black vote from the democratic candidates would have caused the defeat of each democratic candidate (R. 250). Also, Dr. Conrad, one of the plaintiffs and a black surgeon serving on the Dallas School Board, readily admitted that the support of the black community was essential to the election of the Dallas delegation (R. 416). Representative Holmes, one of the black plaintiffs and a man who every witness agreed was a good representative of the black and white communities (severally and collectively), described the Dallas multi-member delegation (R. 423):

> "Oh, I don't know how I would describe the philosophy of the 15-man delegation from Dallas. We differ on a lot of things. We agree on a lot of things. I suppose we run the entire spectrum of what is generally referred to as the conservative to the liberal philosophy, a little heavy on the conservative side."

This hardly describes a delegation chosen with no consideration of appeal to Negro voters.

[30] What is mathematically or theoretically possible and what can be safely done in politics are obviously different things, and *Whitcomb* focuses on actualities not possibilities. It is almost certainly true that some members of the Democratic slate in a multi-member district will appeal to Negro voters more than others, just as some will appeal to any section of society more or less than others. It is also perfectly obvious that representatives elected from single-member districts of a predominately white constituency may make no appeal to black voters, just as representatives elected from single-member districts of predominately black constituency may make no appeal to white voters. But in this respect, Blacks are no different than "union oriented workers, the university community, religious or ethnic groups," 403 U.S. at 156, any of which may be theoretically ignored by successful candidates in certain elections in either single-member or multi-member districts where they constitute a minority of the voters. There was absolutely no evidence that white candidates endorsed by the DCRG "regularly" won county-wide races without appealing to the Negro vote. That is all that *Whitcomb* makes relevant.

erroneous,[31] and likewise irrelevant under *Whitcomb*.[32] The

[31] The trial court nowhere defines its "black ghetto" or identifies the "interests" of the "black ghetto." Admittedly there are areas of Dallas County that are populated predominately by black people, but nowhere does the evidence show, or the trial court find, a "ghetto," within the meaning used and approved in *Whitcomb*, 403 U.S. at 131 n. 8. Furthermore, there is in the record no showing whatsoever of any interest of the black community that is different from the interest of the white community. Such interests, if they exist, are not obvious. All large Texas cities have taken advantage of the Home Rule Amendment of the Texas Constitution [Article XI, § 5] and the statutes enacted pursuant thereto [Article 1165, et seq., Vernon's Texas Civil Statutes]. Generally, these provisions of state law give very broad power to the cities and leave to the legislature items of statewide interest. For example, Mr. Allen, one of the black plaintiffs and a member of the Dallas City Council, testified he was successful in getting the Dallas City Council to pass an open housing ordinance (R. 704, 705). He also testified he was successful in getting the city to undertake a flood control program (1.5 million dollars, 50% federal money, 50% city money) for a predominately black community (R. 705) and that the people of Dallas would undertake this sort of thing because it was a humane thing and the type thing, "That I believe the people of Dallas would respond to, no matter what the color is, and it just happened that these people are black." (R. 706).

Representative Holmes testified that his political philosophy differed from the DCRG on a number of things (R. 423) and that he and Representative Reed, a white legislator from Dallas County, tended to vote alike (R. 423). He described the Dallas multi-member delegation as running the "entire spectrum of what is generally referred to as the conservative to the liberal philosophy, a little heavy on the conservative side." (R. 423). Representative Holmes was asked (R. 429):

"Q. With respect to the sensitivity that I know that you have for the black community, do you feel that the other 14 members of the Dallas County team share this sensitivity with you?

"A. I think there are some members of the team who share that sensitivity. On the other hand, I don't think enough of the members share that sensitivity in the way that I would like to see them share it from the standpoint of how they vote and how they relate to the issues and how they actually seek to become informed as to the concerns and the needs of the black community."

fourth "finding" is not only against the preponderance of the evidence,[33] but is far from controlling under *Whit-*

While Representative Holmes testified that the present number one interest of the black community is single-member districts (R. 447) and that the black community's other interests are tax programs, quality education, vocational education, job opportunities, particularly in state agencies and other businesses throughout the state (R. 448) [all of general interest] and the opportunity for black people to be part of the decision making process, he admitted that Dallas does have county-wide interests in many areas (R. 459): described the diverse racial, religious and ideologic nature of the Dallas delegation (R. 457-458); admitted the DCRG has not applied pressure to influence his vote (R. 127) and that he has voted his conscience as much as if elected from a single-member district (R. 128).

A conclusion that black interests are never considered is not supportable on this record.

[32] There is nothing whatsoever in *Whitcomb* which would make the constitutionality of a particular multi-member district depend upon whether the interests of a particular segment of the voters is considered in the formulation of the "*entire* slate of primary candidates" chosen by a particular party. Since such a segment of the community would obviously have no complaint if a proportional number of the slated candidates were of its own choosing, it is difficult to see what claim it would have to demand that its interests be considered in the selection of the entire slate. Indeed it is impossible to imagine that the interests of all groups could be considered in the slating of all candidates.

[33] There is absolutely no evidence to support the trial court's conclusion that "the DCRG, without the assistance of black community leaders, decides how many Negroes, if any, it will slate in the Democratic primary." The DCRG has two black members on its twenty-five man Board of Directors. (R. 902) Rev. Brown, one of those black board members and a member of the Dallas County Democratic Executive Committee (R. 900), testified that Blacks do have a say in the composition of the DCRG slate (R. 904) and a full, working partnership in the DCRG (R. 910). While Mr. Allen testified that the black community had no say in choosing the candidates (R. 687, 691), he admitted that he had a part in choosing Joe Lockridge, a black, for the DCRG slate (R. 709), and there is no evidence whatsoever that the DCRG excludes its black members when it decides how the slate is to be made up. Nowhere in this case is there evidence to support the statement of the trial court that the DCRG's slate was limited to a "sole black candidate" or its conclusion that no black community leaders assist in deciding how many Negroes will be slated by the DCRG.

comb.[34] And the fifth finding is supported by the evidence only if the relevant evidence is that regarding the Dallas delegation's performance in the 1950's rather than the 1970's.[35]

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[34] The Court in *Whitcomb* did not suggest that the singular existence of any of the conditions which it found missing there would in and of itself condemn the use of multi-member districts. It is obvious that the Court was assessing the totality of conditions to determine the existence of dilution or cancellation of voting strength, and a finding only that Blacks do not have a say in determining the number of candidates slated by a particular party, even if supported by the record, would not necessarily mean that their vote will be diluted or cancelled by the use of a multi-member district. That would depend on a great many other factors including whether those whites who do have a say are sympathetic to the Black community's interests and depend on it for support, and whether Blacks can run and win without being slated by the party. The evidence is undisputed that there were Blacks and whites sympathetic to Blacks on the DCRG that did have a say, and that at least one Black ran and won without even knowing what the DCRG was.

[35] It is interesting to note that the trial court relies exclusively on judicial notice of activities occurring during the 1950's — twenty years ago. That Texas has a history of racial discrimination is established fact. That Texas has made great strides forward in the elimination of this discrimination is similarly established fact. Texas should not be judged now on the basis of conditions in the 1950's, and indeed the Dallas delegation should not be judged now on the basis of what was done or not done by an entirely different delegation twenty years ago. Except for the remote occurrences in the 1950's, there is absolutely no foundation for the conclusion that the Dallas delegation has performed poorly in representing black interests. Indeed, the only specific record evidence of either action or inaction by Dallas' multi-member legislative delegation is that the *whole* Dallas County delegation to the 1971 legislature was instrumental in getting the state highway department to change the design of a highway through a black community (Conrad R. 413, 416), "that one of the main reasons that those 15 members from Dallas County helped get that highway lowered through the Spence community was because the black community was a principal motivating factor in getting them elected in the November primary (sic)." (R. 416).

The trial court received all evidence tendered at trial, with the assurance to counsel that the court would consider only that evidence properly admissible.[36] The result is that the record is replete with hearsay, rank conclusions, and other matters inadmissible under accepted rules of evidence.

An analysis of the admissible evidence — what it does and does not contain — clearly demonstrates that the black community has not been "denied access to the political system" of Dallas County, the ultimate finding required by *Whitcomb*. Blacks serve and have served on the County's legislative delegation; they serve on, are consulted and have been slated by the DCRG; they hold numerous county-wide offices; they have influenced the action of the entire Dallas delegation. They participate and do so meaningfully and effectively. Whether their access to the political system is by grace or right, benevolence or political muscle, access they have: they are heard, they participate, they are represented. To hold that a minority's participation is not "effective" because not as "a matter of right" would be to invalidate the role of majority rule in American politics or invalidate each and every multi-member district in the nation. *Whitcomb* commands no such absurd result.

[36] "Judge Goldberg: I want to repeat once more, maybe it is the same colloquy but just to be sure, everybody understands it, this court is not going to consider anything that it deems irrelevant. We do think you will help the court a lot if you will simply try to keep as much of the matters relevant as possible instead of having a lot of argument. Let's just move along. We would hope that you would have every confidence in the court to the extent that we are not going to consider anything that we do not think is irrelevant, incompetent or material. I will say that again and again and again. As I said at the beginning, time is of extreme importance to everyone in this case. Somebody is going to want somebody else to say we are right or wrong, and I plead with you, once again, to keep that constantly in your mind. Now, proceed." (R. 76).

And to further hold that the State has the burden "of claiming effective participation" and must make its claim good by "showing that the interests of the black ghetto, like those of the white areas, are taken into consideration in the formulation of the entire slate," is to significantly misplace the burden of proof. That is precisely what the trial court did: it assumed the lack of opportunities to effectively participate, and required the State to prove the affirmative or effective participation on the part of racial minorities. Considering this, one can see how the court might have reached its conclusion. "But we have insisted that the *challenger* carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis,* 403 U.S. at 144. Thus the burden is not upon the State to prove that racial minorities have the opportunity to effectively participate in the election processes, but is upon the challengers to show that they do not. Nevertheless, the record preponderates that the black community is not excluded from participation in the political processes of Dallas County. A reading of the record discloses that the State sustained the burden imposed upon it by the trial court, but in any event, the challengers did not sustain the burden imposed upon them by this Court in *Whitcomb*. The only means of supporting the trial court's decision is on a *per se* basis, which has been consistently rejected by this Court, and absent a rule of *per se* invalidity, the multi-member district in Dallas County is not constitutionally infirm.

III.

MULTI-MEMBER DISTRICTING FOR BEXAR COUNTY DOES NOT DILUTE OR CANCEL THE VOTES OF MEXICAN-AMERICAN CITIZENS WHERE THERE ARE NO FINDINGS OF FACT TO SUPPORT A CONTRARY CONCLUSION AND WHERE THE MEXICAN-AMERICAN CITIZENS ARE NOT A NUMERICAL MINORITY.

The trial court's finding of constitutional infirmity with regard to Bexar County legislative districting is even less compatible with the standards of *Whitcomb* than the Dallas situation. The trial court discussed the economic and cultural deprivation suffered by Mexican-Americans, and their concentration in the area of San Antonio known as the Barrio. The trial court superficially disavowed any intention of guaranteeing representative seats in the Texas House of Representatives to Mexican-Americans[37] but then undertook to do just that,[38] without any finding whatsoever that the Mexican-Americans were excluded from the political processes[39] or that multi-member dis-

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[37] "Again, we are not to be understood as saying, and indeed specifically disavow any intention of implying that 'any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represent a majority living in an area sufficiently compact to constitute a single member district.' Whitcomb, *supra,* at ..... No political, racial, or other interest group has any constitutional right to be successful in its political activities." (A.Jur.S. 56A).

[38] "Single-member districts in San Antonio will obviously be *of benefit in remedying the effects of past and present discrimination* against Mexican-Americans. If the voting percentages remain at 30% in the Mexican-American areas, for a short while after single-member districting, *at least the Mexican-Americans will have representation of their interests in the Texas House.*" (A.Jur.S. 56A) (Emphasis added).

[39] The trial court stated:

> "Mexican-American participation in the political process of Bexar County is markedly deficient. Of course, there are many types of political alienation, and mere lack of participation by a particular group in the political process does not necessitate corrective action. But, just as Courts have drawn appropriate *inferences* from the absence of Mexican-Americans from jury venires, *Hernandez and Muniz,* supra,

tricts in any way operate to cancel or dilute their voting strength. The lower court made no findings relevant to the guidelines of *Whitcomb*.

Appellants need not dispute that Mexican-Americans are economically and culturally deprived, nor need they dispute that Mexican-Americans constitute a "minority" in Texas, both numerically and to the extent of being protected by the Fourteenth Amendment. However, in Bexar County, Mexican-Americans are not a *numerical* minority, but constitute a plurality,[40] and given the stipulated facts that the rights to register and to vote have not been infringed in Texas or Bexar County, it is difficult to conceive how a multi-member district unconstitutionally operates to dilute or cancel their voting strength. Instead, the record clearly shows that the Mexican-American voting strength is diluted because only approximately 30% of the eligible Mexican-Americans avail themselves of the opportunity to register and vote.[41]

Part IV of the per curiam opinion demonstrates just how far courts have wandered into the political thicket and how divorced from judicial standards it is possible for them to become. It begins with the premise that "Chicanos", as a recognizable minority, require the protective intervention of the federal courts (A.Jur.S. 42A); then proceeds on the thesis that discrimination at other times and other places is a sufficient basis for judicial interference with the lawful political structure of the Bexar County Legislative district; and concludes that although: [t]he State action at issue

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so they *must* regarding political participation." (A.Jur.S. 50A) (Emphasis added).

This does not meet the *Whitcomb* guideline that "the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." 403 U.S. at 144.

[40] A.Jur.S. 54A.

[41] *Id.*

here, the apportionment of Bexar County, did not 'cause' the low voter participation" (A.Jur.S. 55A), "Single-member districts in San Antonio will obviously be of benefit in remedying the effects of past and present discrimination against Mexican-Americans." (A.Jur.S. 56A). Because the facts of this case can support no charge of either attempt at dilution of voting power, or dilution of voting power, as a result of the multi-member district in Bexar County, the author of Section IV effectuated his own political preference.

The lower court characterized Texas as having "the most restrictive voter registration procedures in the nation" (A.Jur.S. 51A), and concluded that the "right to vote may be abridged as easily by making its exercise excessively difficult as by prohibiting its exercise entirely." (A.Jur.S. 53A). These conclusions are wholly unfounded in the record, since the parties specifically stipulated there had been no denial in Texas of the right to register and vote since 1961, and the record contains no evidence to the contrary. Moreover, even these conclusions do not go so far as to indicate that Mexican-Americans were *not allowed* to register and vote, as *Whitcomb* specifies. 403 U.S. at 149.[42]

The lower court pointed out that "an Anglo member of the House of Representatives from Bexar County was unable to identify any piece of legislation sponsored by any member of the Bexar County delegation at the last session of the Legislature to relieve or remedy the adverse conditions extant in the West Side." (A.Jur.S. 52A). However, there was no finding regarding "recurring poor perform-

[42] As recently as 1965 the then seven member multi-member House delegation from Bexar County consisted of three Mexican-Americans, three Anglo-Americans and one Chinese-American. The present San Antonio City Council is composed of nine members elected city-wide. The Council consists of three Mexican-Americans, one Negro and five Anglo-Americans (one of whom is a woman) (Barrera, R. 558). A number of Mexicans hold elective public office in Bexar County (Barrera lists them, R. 554-557).

ance by . . . [the Bexar County] . . . delegation with respect to . . . [the Barrio] . . ., nothing to show what the . . . [Barrio's] . . . interests were in particular legislative situations and nothing to indicate that the outcome would have been any different if the . . . [Bexar County legislators] . . . had been chosen from single-member districts." 403 U.S. 155.

There is some conflicting testimony that voting in Bexar County tends to split on racial lines,[48] but regardless of the conclusion to be drawn from this testimony, what difference does it make when the Mexican-Americans and Anglo-Americans are of approximately equal numbers, and there is no interference with the right to register and vote?

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[48] A detailed analysis of testimony about Bexar County is not necessary, but the statement of Section IV (A.Jur.S. 51A) that, "The record shows that the Anglo-Americans tend to vote overwhelming against Mexican-American candidates . . ." requires contradictions. The following testimony by Mr. Barrera is uncontroverted (R. 562):

"A. I have found this, whenever a candidate seeks to base his candidacy by an appeal to ethnic background, whether it is a majority group or a minority group, that the minority candidate is going to necessarily find that he is going to be short of votes when it is all over. If the appeal is based to qualification, to capability, to a determination to represent the people of the community as a whole, in whatever post a man seeks to be elected to, that this is lessened quite a bit. And, we have, of course, county-wide elections now of minority group representatives where it is not an issue and has not come to the fore and they have been elected."

Mr. Garza testified (R. 626, 627):

"Q. Do you feel that either the Mexican-American or the Anglo-American vote on purely ethnic background in San Antonio?

A. I think certain ethnic groups do. I wouldn't say the majority of the people do this.

Q. You mean certain people in each ethnic group?

A. In each ethnic group, yes.

Q. Do you have any particular basis in mind for your opinion that a certain element of each ethnic group does, and another element of it does not?

If the Mexican-American people of Bexar County registered and voted in the same proportion as do the black citizens of Dallas County, this part of the case would be frivolous. Surely this Court should not adopt the rule adopted by the trial court to the effect that the Constitution requires more than equality of opportunity to participate in the political processes.

That many Mexican-Americans suffer poverty need not be controverted; that they constitute an identifiable ethnic group, and that they have not been as active in political affairs as they could be similarly need not be controverted. However, absent evidence and findings of some facts showing infringement of their political rights, or some inhibitions to their right to participate in the political process, poverty, ethnicity, and inaction are no basis for judicial action with regard to apportionment. The federal courts should not embrace a rule that a disadvantaged group, regardless of numbers and access to the political processes,

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A. I didn't understand the question.
Q. Do you have any experiences of your own which would indicate to you that, say, Anglo-Americans will vote for Mexican-American candidates or vice versa?
A. Well, I think I have to look at my own race in this last city election and could pretty well tell you that my support came from the north side, approximately 60 boxes out of the north side, and, here again, I have to say that I concentrated on these 60 boxes.
Q. By work and money, you mean?
A. By work and money and energy, primarily, because Dr. Neilson was fairly strong on the west side of town and on the east side of town.
Q. The areas you are referring to that Dr. Neilson was strong in are predominantly Mexican-American and Black?
A. And Black. However, on the runoff I concentrated, once I saw the total picture, then I concentrated on most of the city, and I only lost 28 out of 227 boxes.
Q. Would you consider your race a practical illustration of practical politics in San Antonio?
A. You could do that if you wanted to."

is entitled to favored treatment in legislative districting. "The mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the populaton is being denied access to the political system."[44]

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[44] *Whitcomb* v. *Chavis*, 403 U.S. at 154-55.

CONCLUSION

For the foregoing reasons, appellants respectfully pray that the judgment of the court below be reversed, and the redistricting plan submitted by the Board be declared to meet the requirements of the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing printed Appellants' Brief has this the ..... day of February, 1973 been served upon each counsel of record for appellees in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first-class postage prepaid, addressed to said counsel at their post office addresses.

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Leon Jaworski